



No. 89-1721

In the
Supreme Court of the United States

October Term, 1989

JOHN H. COX,
Petitioner

vs.

**KEystone CARBON COMPANY,
RICHARD REUSCHER and
WILLIAM REUSCHER,**

**KEystone CARBON COMPANY,
Respondent**

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

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STATEMENT OF THE CASE

This case was initiated by the Petitioner, John H. Cox ("Cox"), in the United States District Court for the Western District of Pennsylvania (the "District Court"). The complaint alleged that Respondent Keystone Carbon Company¹ ("Keystone") and two of its principal officers had improperly terminated Cox's employment for the purpose of interfering with his attainment of employee benefit rights in violation of Section 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. § 1140 (1985).²

Claims against the individual defendants were dismissed by the District Court on motion prior to trial and no appeal from such dismissal was taken.

Over Keystone's objection, the District Court permitted Cox's Section 510 claim and certain limited elements

¹Keystone Carbon Company has no parent or non-wholly owned subsidiary companies.

²Section 510 reads, in pertinent part, as follows:

Interference with Protected Rights. It shall be unlawful for any person to discharge, fine, suspect, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act.

* * *

The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

of damages (back pay and medical expenses) to be submitted to a jury which found in favor of Cox in the amount of \$250,000.

Subsequently, following Keystone's post-trial motions, the District Court determined that the claims should not have been submitted to a jury and ordered a new trial.

The trial record was then submitted to the District Court which ultimately entered findings and a judgment in favor of Keystone.

Cox filed an appeal, *Cox v Keystone Carbon Co.*, 861 F.2d 390 (3d Cir. 1988) ("Cox I") in the United States Court of Appeals for the Third Circuit.

In *Cox I* the Third Circuit determined that there is no right to a jury trial in Section 510 claims brought under remedial Section 502(a)(3) of ERISA, 29 U.S.C.A. § 1132(a)(3) (1985). The case, however, was remanded to the District Court to determine whether Cox had presented any Section 510 claim under remedial Section 502(a)(1)(B)

of ERISA, 29 U.S.C.A. § 1132(a)(1)(B), and, if so, whether he was entitled to a jury trial under that section.³

The District Court concluded that Cox had presented a claim under Section 502(a)(1)(B) but that there is, likewise, no right to a jury trial under that section.

Cox then filed a second appeal in the Circuit Court, *Cox v. Keystone Carbon Co.*, 894 F.2d 647 (3d Cir. 1990), ("Cox II").

In *Cox II* the Third Circuit determined that there is no right to a jury trial in Section 510 claims brought under remedial Section 502(a)(1)(B).

³The applicable portions of Section 502(a) read as follows:

Civil Enforcement.

(a) Persons empowered to bring a civil action

A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section,
or

(B) to recover benefits due to him under the terms of his plan,
to enforce his rights under the terms of the plan, or to
clarify his rights to future benefits under the terms of the
plan;

* * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or
practice which violates any provision of this subchapter or the
terms of the plan, or (B) to obtain other appropriate equitable
relief (i) to redress such violations or (ii) to enforce any provi-
sions of this subchapter or the terms of the plan;

SUMMARY OF ARGUMENT

Cox maintains that, because of ERISA's preemptive effect, he has been deprived of a jury trial right which he would have had under Pennsylvania's common law of wrongful discharge. He presumes that the common law of Pennsylvania would permit him to bring an action for wrongful discharge identical in nature to an ERISA section 510 action under the circumstances alleged in the complaint. He further presumes that Congress was not empowered to preempt this action in enacting ERISA.

This argument should not be heard by this Court because Cox did not present his current position to the District Court or the Third Circuit.

Further, there is not now, nor has there ever been, an action of wrongful discharge under Pennsylvania law where an at-will employee alleges that he was fired for the primary purpose of preventing him from attaining plan benefits.

Moreover, even if Pennsylvania had recognized such a tort for which a jury trial might attach, that fact would be wholly irrelevant to the issue of whether ERISA, which preempts all laws relating to plan benefits, provides for a jury trial in the type of ERISA claim actually pursued by Cox.

There is no significant disagreement among the circuit courts as to any issue presented, and the decision of the Third Circuit is consistent with prior decisions of this Court.

ARGUMENT

The issues raised in Cox's Petition for Certiorari ("the Petition") are not particularly complex or new.

The essential question is whether the right to a jury trial, as preserved by the Seventh Amendment to the Constitution of the United States, attaches in a claim brought to enforce rights created by Section 510 of ERISA.

Section 510 precludes the discharge of an employee for the purpose of interfering with the attainment of employee benefit rights.

Concurrent causes of action under state law are preempted by ERISA in accordance with Section 514(a) of ERISA, 29 U.S.C.A. § 1144(a).

Section 510 claims can be enforced only pursuant to the specific remedial provisions of Section 502 of ERISA. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985).

In the context of this case, only remedial Sections 502(a)(1)(B) and 502(a)(3) are applicable. *Cox I*, 861 F.2d at 392.

I. The Petition Raises Issues Not Presented To The Courts Below.

The question of Cox's right to a jury trial has been briefed and argued on three separate occasions before the District Court and on two separate occasions before the Third Circuit.

On each occasion and at all times prior to the filing of the present petition, Cox has consistently maintained that Section 510 of ERISA has created a cause of action the nature of which is analogous to a common law tort. On the

sole basis of that premise, he has then contended throughout that a jury trial is required.

Adhering to the precepts of *Lorillard v. Pons*, 434 U.S. 575 (1978) and *Tull v. United States*, 481 U.S. 412 (1987), consideration of this issue involves a two-step analysis.

First, the intent of Congress in adopting the statute must be examined. If the procedural and remedial provisions indicate an intent to provide equitable rather than legal relief, then no right to a jury trial is intended. *Great American Federal Savings and Loan Assoc. v. Novotny*, 442 U.S. 366 (1979).

Second, if no right to a jury trial is indicated by congressional intent, such right may be dictated by the Seventh Amendment if the statute in question has created legal rights and remedies enforceable in an action for damages in the ordinary courts of law. *Curtis v. Loether*, 415 U.S. 189 (1974).

Both the District Court and the Circuit Court considered Cox's position in light of the above analysis and concluded that Section 510, as enforceable through Sections 502(a)(1)(B) and 502(a)(3), creates a statutory right of action for which only equitable remedies are available.

Now, for the first time, Cox asserts a new theory. He advances the proposition that the right to a jury trial is grounded not in the right of action and remedies created by Sections 510, 502(a)(1)(B) and 502(a)(3), but rather upon the basis that a pre-existing state cause of action, with an attendant jury trial right, has been preempted.

Cox's current theory raises several questions of law which would require resolution prior to consideration of the ultimate question in this appeal of his entitlement to a

jury trial. First, his present theory requires a determination as to whether any actual existing common law right of action has, in fact, been preempted. Second, if a common law right of action has been preempted, it must be determined whether such cause of action was one which would entitle a claimant to a jury trial. Third, if a common law right of action has been preempted and if such right of action would have entitled a claimant to a jury trial under state law, it must then be determined whether the right to jury trial is preserved notwithstanding ERISA's broad preemptive effect.

These threshold legal issues were not considered or decided by either the District Court or the Third Circuit because they were not raised by Cox. Issues involving these questions, therefore, have not been preserved and should not be heard for the first time here. *Youakim v. Miller*, 425 U.S. 231, 234 (1975); *Hormel v. Helvering*, 312 U.S. 552, 556 (1940). This principle has found acceptance in the circuit courts as well as in this Court. E.g., *Newark Morning Ledger Co. v. United States*, 539 F.2d 929, 932 (3d Cir. 1976) ("We generally refuse to consider issues raised for the first time on appeal").

II. The Petition Misstates the Law of Pennsylvania and Erroneously Assumes that the Allegations in Cox's Complaint stated a Cause of Action Under State Law.

Cox was an at-will employee of Keystone. He contends, however, that except for ERISA's preemptive effect, he would have had a common law cause of action for wrongful discharge which would have entitled him to a jury trial under the law of Pennsylvania. This contention is misplaced.

Pennsylvania retains the doctrine that an at-will employee may be discharged at any time, for any or no reason, with or without cause. *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974).⁴ It remains the rule in Pennsylvania that there is no common law cause of action against an employer for the termination of an at-will employment relationship. Several exceptions to this rule have been recognized only in the most limited circumstances where a discharge would threaten clear mandates of public policy. *Clay v. Advanced Computer Applications, Inc.*, 522 Pa. 86, 559 A.2d 917 (1989). E.g., *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super 28, 386 A.2d 119 (1978) (discharge for performing jury duty actionable).

The question of whether a plaintiff has stated a claim for wrongful discharge is a preliminary question of law for a trial court to decide. Where there is no legally cognizable cause of action, a claim of wrongful discharge cannot be submitted to a jury. *Paul v. Lankenau Hospital*, ___ Pa. ___, 569 A.2d 346, 348-9 (1990).

The Petition sets forth only the legal concept that the courts of Pennsylvania have recognized several limited exceptions to the at-will employment doctrine on the basis of public policy. It contains no support for the theory that Cox's own claim falls within any such exception.

⁴*Geary* has been interpreted as admitting the possibility of a general public policy exception to the at-will employment doctrine in Pennsylvania. In subsequent opinions, the Supreme Court of Pennsylvania has clearly stated that it defined no such exception in *Geary*. See *Paul v. Lankenau Hospital*, ___ Pa. ___, 569 A.2d 346, 348 (1990); *Clay v. Advanced Computer Applications, Inc.*, 522 Pa. 86, 98, 559 A.2d 917, 922 (1989) (Nix, C.J., concurring).

Cox's entire claim was based on his allegations that he was discharged for the purpose of interfering with the attainment of employee benefit rights. A claim of this nature had never been recognized in Pennsylvania as an exception to the at-will employment doctrine prior to the passage of ERISA. Cox, therefore, had no pre-existing right to a jury trial under Pennsylvania law and no such right was preempted.

Since there is no common law basis for an exception to the at-will employment doctrine where an employee has been discharged for the purpose of interfering with employee benefit rights, Cox points to Section 510 of ERISA itself and to the Pennsylvania Human Relations Act, 43 P.S. §§ 951-963, as statements of clearly-mandated public policy upon which an exception could be based. This argument that state and federal statutes create a common law action for wrongful discharge is circuitous and self-defeating. It is also diametrically opposite to the law of Pennsylvania.

Remedies provided by ERISA and the Pennsylvania Human Relations Act are statutory remedies and not common law remedies. The Supreme Court of Pennsylvania has held specifically (with respect to the Pennsylvania Human Relations Act) that statutory remedies preclude the assertion of a common law tort action. *Clay, supra*, 559 A.2d at 919-920. The Third Circuit has likewise recognized that the only Pennsylvania cases applying a public policy exception to the at-will employment doctrine have done so where no statutory remedies are available. *Bruffett v. Warner Communications, Inc.*, 692 F.2d 910 (3d Cir. 1982) and *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983).

A reading of *Bruffett* (which involved a claim of discharge or refusal to hire because of disability and which also particularly referred to Section 510 of ERISA as another kind of statutory-protected right) clearly reveals that statutory rights of action under Pennsylvania and federal legislation (age, sex, disability, labor activity, etc.) do not create a common law right of action in Pennsylvania and that the statutes themselves provide the exclusive remedy. *See also Bonham v. Dresser Indus., Inc.*, 569 F.2d 187, 195 (3d Cir. 1977), cert. denied 439 U.S. 821 (1978) (Pennsylvania Human Relations Act provides the exclusive state remedy for vindication of age discrimination . . . passage of that act does not create a separate common law claim.).

While Cox states in the Petition that he unquestionably would have had a common law right of action in Pennsylvania except for its preemption by ERISA, the exact opposite is true. No such common law right of action ever existed in Pennsylvania.

III. The Seventh Amendment Does Not Prevent Congress From Enacting Comprehensive Federal Legislation Which Preempts all Related State Law Rights and Remedies in a Particular Field.

Undoubtedly an important Seventh Amendment issue would arise were Congress to supplant all common law jury trial actions with statutes containing identical rights and remedies save the right to a jury trial. To argue as Cox does that the passage of ERISA is one step in this direction, however, ignores reality. Congress did not preempt Pennsylvania's common law of wrongful discharge in its entirety by enacting ERISA; it only preempted claims brought pursuant to that law to the extent any particular

such claim (assuming one might exist) relates to ERISA plans. Such legislative action is not prohibited by the Seventh Amendment and has a clearly legitimate, important purpose.

Numerous recent decisions of this Court discuss the extreme breadth and strength of ERISA preemption, and the importance of maintaining ERISA's exclusivity as the law relating to employee benefit plans. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981).

ERISA's preemption provisions are deliberately expansive, designed to establish pension plan regulation as exclusively a federal concern. *Pilot Life Ins. Co. v. Dedeaux*, 107 S.Ct. 1549, 1552 (1987).

Varying state causes of action for claims within the scope of § 502(a) would pose an obstacle to the purposes and objectives of Congress in having federal law occupy the field. *Id.* at 1555.

Similarly, it is submitted, varying ERISA rights from state to state based upon rights and remedies of preempted state laws would be disastrous to ERISA's finely-tuned remedial scheme:

The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.

Id. at 1556. See also *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) ("Where a statute expressly provides a particular remedy or remedies, a court must be chary about reading others into it.").

Where Congress has clearly intended to preempt all laws relating to a specific area of important federal concern, such as employee benefit plans, there is no weight to the argument that the Seventh Amendment has been eroded simply because certain state jury trial actions—to the extent they relate to ERISA—have been preempted.

IV. The Decisions Of The Circuit Courts Are Not In Conflict.

Cox I and *Cox II* are among a series of decisions in the Third Circuit considering and analyzing the right to a jury trial in ERISA claims.

In *Turner v. CF&I Steel Corp.*, 770 F.2d 43 (3d Cir. 1985), cert. denied 474 U.S. 1058 (1986), the court held that claims under Section 502(a)(1)(B) are equitable in nature and there is no right to a jury trial. The Circuit Court also indicated that claims under Section 502(a)(3) of ERISA are equitable by definition.

In *Zipf v. American Telephone & Telegraph Co.*, 799 F.2d 889 (3d Cir. 1986) the court recognized that claims to enforce rights under Section 510 of ERISA are premised on Section 502(a)(3) and not Section 502(a)(1)(B).

In *Cox I*, the court held that the remedies provided by Section 502(a)(3) are equitable and no right to a jury trial attaches.

In *Pane v. RCA Corp.*, 868 F.2d 631 (3d Cir. 1989), the court held that there is no right to a jury trial in a Section 510 claim brought under Section 502(a)(1)(B).

Finally, in *Cox II*, the court reiterated its prior decisions and determined that there is no right to a jury trial in the instant Section 510 claim.

These past decisions of the Third Circuit are comprehensive and exhaustive of the subject matter.

Moreover, there is no disagreement among the various circuits in this area. In every instance where the question has arisen, the courts have determined that ERISA claims under the enforcement provisions of Section 502 are equitable in nature and do not entitle claimants to a jury trial. *E.g., Bair v. General Motors Corp.*, 895 F.2d 1094 (6th Cir. 1990); *Wardle v. Central States, Southeast and Southwest Areas Pension Fund*, 627 F.2d 820 (7th Cir. 1980), cert. denied 449 U.S. 1112 (1981); *Calamia v. Spivey*, 632 F.2d 1235 (5th Cir. 1980); *Katsaros v. Cody*, 744 F.2d 270 (2d Cir. 1984), cert. denied 469 U.S. 1072.

V. The Decision Of The Circuit Courts Are in Accord With Applicable Decisions of This Court.

As has been stated, in determining the question of Cox's right to a jury trial, the Third Circuit was guided by this Court's decisions in *Lorillard v. Pons*, 434 U.S. 575 (1978), and *Tull v. United States*, 481 U.S. 412 (1987).

The remedial provisions of Sections 502(a)(1)(B) and 503(a)(3) were examined and analyzed to determine whether Congress, in adopting ERISA, intended to provide equitable rather than legal remedies. Finding that legal remedies were not intended, the Circuit Court determined that a jury trial is not proper under the terms of the statute in question, following *Great American Federal Savings and Loan Assoc. v. Novotny*, 442 U.S. 366 (1979).

In the absence of Congressional intent to provide legal remedies, the Circuit Court then examined Cox's rights under the Seventh Amendment and particularly in light of this Court's decision in *Curtis v. Loether*, 415 U.S. 189 (1974). Such analysis is similar to that followed in determining Congressional intent. If the statute does not provide legal rights and remedies enforceable in an action for damages in the ordinary courts of law, no jury trial is required.

Keystone believes that *Curtis* is dispositive of the Seventh Amendment issue in this instance. In that case, this Court found that a jury trial was required specifically relying on the element that the statute in question provided for "damages" as a part of the available remedy. No such damage provision is included in the remedial sections of ERISA.

Further, while not relating directly to the jury trial question, this Court has already determined that the remedial provisions of ERISA are equitable in nature and that "damages" in a traditional compensatory sense cannot be awarded in Section 502 claims, *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985).

It is especially significant here that this Court has previously refused to grant certiorari in the similar case of *Turner v. CF&I Steel Corp.*, 770 F.2d 43 (3d Cir. 1985), cert. denied 474 U.S. 1058 (1986).

Finally, Cox suggests that certiorari should be granted as a logical extension of the writ of certiorari issued in *McClelland v. Ingersoll Rand Co.*, 779 S.W.2d 69 (Tex. 1989), cert. granted 58 U.S.L.W. 3657 (1990).

The issue in that case is unrelated to the issues here. In *McClelland*, the plaintiff pursued a common law wrongful

discharge action through the state courts of Texas. Here, Cox's claim is under a federal statute. Cox's cause of action for wrongful discharge was dismissed on motion on the basis that such cause was preempted by the ERISA cause of action. No appeal was filed from such dismissal and any future determination that state causes of action are not preempted will not affect the outcome of this case.

CONCLUSION

For the reasons stated in this brief, Keystone Carbon Company requests that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the within **Brief** were sent on June 21, 1990 first class mail, postage prepaid, to each of the following:

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